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No. 07-270

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IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE NEW YORK CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

v.

ELSA GULINO, MAYLING RALPH and PETER WILDS, on behalf of themselves and all other similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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PRELIMINARY STATEMENT

This brief is submitted, pursuant to Rule 15, in reply to new points raised by respondents in their Brief in Opposition to the Petition for Certiorari.

ARGUMENT

POINT I

THE DISTINCTION, POSITED BY RESPONDENTS, BETWEEN "LICENSES" AND "CERTIFICATIONS" IS OF NO LEGAL CONSEQUENCE.

Contrary to the distinction asserted by respondents, nothing turns on whether the documents governed by the State examination at issue here — the LAST — are called "licenses" or "certifications." *See* BIO at 6.[1] Even if the distinction between licensing and certification tests matters in other contexts, it is irrelevant here. It is indisputable that the State has exercised its police powers to protect the public welfare by setting the minimum level of competency necessary for those who would hold permanent full-time positions as public school teachers. That circumstance, not how the test is labeled, is what is relevant to the question presented to this Court.

In any event, respondents are mistaken in asserting that the LAST is not a licensing test. The Second Circuit concluded that the LAST is part of the State's efforts to

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1. "BIO" refers to respondents' Brief in Opposition to Certiorari.

regulate the quality of public school teachers through licensure requirements. *See* Petitioner's Appendix at 4a n.1, 29a, 37a n.21. That conclusion formed the basis of the Second Circuit's holding that SED is not respondents' employer - a holding that respondents have not challenged in this Court. Refuting respondents' argument that the LAST is not a licensing test because it applies to public school teachers only, the Second Circuit noted that the State regulates private school teachers in comparable ways and has legitimate reasons for treating the two categories separately. *See* Petitioner's Appendix at 38a-39a n.21. Even respondents' own expert, Dr. Frank Landy, testified that the LAST is a licensing test, that licensing tests and employment tests are developed and validated differently, that licensing tests are designed to prevent harm to the general public as distinct from employment tests which are designed to predict job performance, and that the LAST is comparable to teacher licensing tests administered in forty-two states. *See* Tr. 1428-33. The LAST's incontrovertible status as a licensing test is incompatible with the Second Circuit's holding that, under Title VII, BOE is potentially liable for the test's implementation. Accordingly, the question presented in the Petition for Certiorari is squarely before this Court.

POINT II

THERE IS NO NEED FOR FURTHER FACTUAL DEVELOPMENT ON REMAND.

Respondents err further in asserting a need for further factual development on remand. *See* BIO at 8-9. A remand will determine only whether the LAST has a disparate impact not justified by business necessity based on test validation evidence. That issue is not

relevant to the question presented in the Petition for Certiorari. The question raised by petitioners goes to the scope of Title VII and is, therefore, one of pure statutory interpretation. The record relevant to that inquiry is fully developed. The immediate adverse consequences of the Second Circuit's decision are described on pages 16-18 of SED's brief as respondent and demonstrate that this case warrants review. Moreover, deferring consideration of the question presented would subject BOE to the burdens, costs, and risks that the Petition argues should not be imposed on it under the current circumstances.

POINT III

PETITIONER PRESERVED BELOW THE ARGUMENT THAT IT SHOULD NOT BE LIABLE FOR THE DISPARATE IMPACT OF A STATE LICENSURE TEST OVER WHICH IT HAS NO CONTROL.

Contrary to what respondents assert (BIO at 9-10), petitioner preserved in the lower courts the argument that it should not be liable for the disparate impact of a state licensure test over which it had no control. *See, e.g.*, BOE Memorandum in Support of Motion to Dismiss at 2, 10-11 ; BOE Memorandum in Support of Motion for Summary Judgment at 2, 7-9; BOE Proposed Findings of Fact at 54: BOE Respondent's Brief (Second Circuit) at 12-20. By noting that petitioner did not include its legal memoranda in the appendix submitted to the Second Circuit, respondents cite a fact that is both true and irrelevant to the preservation issue. Respondents have conflated the record, defined under Fed. R. App. P. 10(a)(1) as all original papers and exhibits filed in

the District Court, with the appendix, which under Fed. R. App. P. 30(a)(2) may not include memoranda of law except under unusual circumstances. In any event, the parties may rely on parts of the record — including the memoranda — that are not included in the appendix. Fed. R. App. P. 30(a)(2). The trial memoranda demonstrating preservation are indisputably part of the record.

POINT IV

BOE NEVER MAINTAINED CONTROL OVER THE DECISION TO USE THE LAST.

Respondents are also mistaken to suggest that BOE "maintained control" over the decision to use the LAST for teacher candidates. *See* BIO at 16. As the District Court described in exhaustive detail, the LAST was developed by SED with outside experts; BOE played no role. *See* Petitioner's Appendix at 97a-103a. The statutory scheme under which BOE set its own licensure requirements ended in 1991, when the State mandated that all public school teachers must pass a State licensing test. While at one time the State granted BOE temporary exemptions to the licensure requirements because of a severe teaching shortage in New York City, it eventually adopted regulations sharply limiting the use of unlicensed substitute teachers. *See* Tr. at 2329-32. The implementation of the LAST stripped BOE of any control over the matter of which test should serve as a condition for obtaining a public school teachers' license. Thus the LAST is not, and never has been, a "hiring provision" or "employment practice" as defined under Title VII, but rather was and continues to be a generally applicable State-mandated licensing requirement imposed under the authority of the State's police power.

POINT V

SED IS PERMITTED TO FILE A BRIEF WITH THIS COURT BECAUSE IT WAS A PARTY TO THE PROCEEDING IN THE COURT BELOW.

Finally, respondents incorrectly aver that SED should not be permitted to file a brief in this Court. *See* BIO at 16-17. This Court's Rule 12.6 provides that "[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court." SED was a party to the proceeding in the Second Circuit and is therefore entitled to file a brief in this Court. Respondents cannot point to a jurisdictional problem because there exists a live case or controversy between BOE and respondents.

In any event, respondents have no cause to complain about SED's filing. Had SED not been a respondent under Rule 12.6, it could have filed a brief as amicus curiae as a matter of right under Rule 37.4 of this Court. That SED, after having been dismissed from the case by the Second Circuit, nonetheless retains a strong enough interest in the outcome to file a brief supporting the petition merely confirms that this case presents an important question of federal law that warrants this Court's review.

CONCLUSION

For the reasons set forth, BOE respectfully asks this Court to grant its petition for a writ of certiorari.

Respectfully submitted,

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